In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1043

E. V. WILLIAMS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 432 F.2d 557. The Board decision and order in the unfair labor practice case (Pet. App. 2a-6a)[1] are reported at 175 NLRB No. 134. The decisions in the related representation case are set forth in Pet. App. 6a-21a.

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[1] Only portions of the Trial Examiner's decision are set forth at Pet. App. 4a-6a. The full text is set forth at A. 209-226. ("A." refers to the appendix to the briefs filed in the court of appeals.)

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1970. The petition for a writ of certiorari was filed on December 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly sustained the union's challenges to the ballots cast by ten college students in a representation election without holding an evidentiary hearing.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Section 8(a) It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
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> • • • •
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

On March 20, 1968, Laborers' District Council of Virginia, Local 307, and International Union of Operating Engineers, Local 147, filed a petition for a rep-

resentation election among the employees of the Company, a road contractor (Pet. App. 6a-8a). After a hearing, the Board's Regional Director directed an election, finding it appropriate to apply the Board's usual eligibility standard, under which workers employed during the payroll period immediately preceding the date of the direction of election would be eligible (Pet. App. 9a-12a, and n. 5).[4] The election results were 142 votes for the Union, 122 against, 29 challenged ballots,[5] and 2 void ballots (Pet. App. 13a).

The Regional Director investigated the status of the 10 college students whose ballots were challenged by the Union (n. 3, *supra*). He found that 9 of the students indicated when hired that they were returning to school; that 6 had completed at least a year of college; that none had plans to work for the Company the following summer, and none planned to work for it during the school year; and that only one had

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[4] The Company had contended that, in view of the fluctuating nature of its operations, eligibility should extend to all employees who were employed for 30 days within the year preceding the eligibility date, and to those employed sometime during the preceding year and at least 45 days during the 2 years preceding the eligibility date (Pet. App. 9a, n. 5).

[5] The Unions challenged 16 ballots—6 on the ground that the voters were supervisors and 10 on the ground that the voters were students employed for the summer only. The Company challenged one ballot on the ground that the voter had been discharged prior to the election. The Board agent challenged 12 ballots on the ground that the voters' names did not appear on the eligibility list. (Pet. App. 14a.) The Company and the Unions agreed that 5 of the Board agent's challenges, and the Company's one challenge, should be sustained (Pet. App. 20a).

worked for the Company other than during the summer, and this occurred during his Christmas vacation from school (Pet. App. 14a-19a). On the basis of these facts, the Director concluded that the 10 students did not have any reasonable expectancy of permanent employment with the Company and did not possess a sufficient community of interest with the unit employees to be included in the unit;[1] he therefore sustained the Union's challenge to the 10 ballots (Pet. App. 19a). Since the remaining 13 challenged ballots were insufficient to affect the results of the election, which showed that the Unions had received a majority of the valid ballots, the Regional Director ordered that the Unions be certified as the collective bargaining representative of the Company's employees (Pet. App. 20a-21a).

The Company filed exceptions to the Regional Director's Decision and Certification with the Board. The Company contended that the Director had erred in sustaining the challenges to the 10 student ballots, for it was the customary practice of the Company to hire students during the summer months; about 10 percent of the Company's work force as of the election eligibility date consisted of students; and the students were paid the same rate prevailing among all employees for the particular jobs they were performing

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[1] Under the Board's decisions, summer students are excluded from a bargaining unit unless they have a reasonable expectancy of future permanent employment; the mere expectancy of subsequent summer employment is not enough. *National Labor Relations Board* v. *Joclin Mfg. Co.*, 314 F. 2d 627, 634-635 (C.A. 2); *Brown-Forman Distillers Corp.*, 118 NLRB 484, 485.

(A. 173-174). The Board denied review on the ground that there were "no substantial issues warranting review" (Pet. App. 22a).

When the Company then refused to bargain, the Unions filed an unfair labor practice charge with the Board; the General Counsel of the Board issued a complaint on the charge, and, after the Company answered, moved for summary judgment; whereupon, the Trial Examiner ordered the Company to show cause why the General Counsel's motion should not be granted (A. 211-212). In its response, the Company attacked the validity of the certification, alleging that the Regional Director's investigation of the challenges to the student ballots had been inadequate and that the issue required an evidentiary hearing (A. 207-208). The Trial Examiner granted the General Counsel's motion for summary judgment, noting the settled Board policy not to allow relitigation of issues determined in representation proceedings absent newly discovered or previously unavailable evidence, which had not been presented here (Pet. App. 4a-6a; A. 216). The Board, affirming the Examiner, held that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Unions and ordered the Company, *inter alia*, to bargain with them on request. (Pet. App. 2a-3a, A. 222-A 224.)

The court of appeals, in a *per curiam* opinion, upheld the Board's decision and enforced its order. The court stated (Pet. App. 2a):

> The students were ruled ineligible to vote because they were temporary or casual summer employ-

ees lacking both reasonable expectancy of permanent employment with the company and sufficient community of interest to be included in the unit. We find that the Board neither committed procedural error nor abused its discretion in sustaining the challenge to the ballots * * *.

ARGUMENT

In the exercise of its broad discretion to determine the unit appropriate for collective bargaining and the employees eligible to vote in a representation election, the Board has concluded (see n. 4, *supra*) that summer students do not have a sufficient community of interest with other employees unless they have a reasonable expectancy not merely of future summer employment, but of forthcoming permanent employment. Petitioner does not appear to question the validity of this principle, but merely contends that the Board erred in applying it to the facts of this particular case. That is, petitioner contends that, since the Company employed 31 students, the Board should not have ruled on the status of the 10 to whom the Union objected without first affording the Company an evidentiary hearing for the purpose of adducing the facts as to the other students. Such an issue, which turns on the circumstances of this particular case, does not warrant further review. In any event, the Board acted properly in declining petitioner's request for a hearing on the status of the other student

employees.[4] No challenges had been filed to the votes cast by those students.[5]

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[4] The petition does not present the issue involved in *Magnesium Casting Co.* v. *National Labor Relations Board*, No. 370, 1970 Term, and *Pepsi-Cola Buffalo Bottling Co.* v. *National Labor Relations Board*, 409 F.2d 676 (C.A. 2), certiorari denied, 396 U.S. 904—*i.e.*, whether the Board is required to review the record *de novo* before issuing an unfair labor practice order based on its regional director's representation determination. Both before the Board and the court of appeals, the Company merely contended that it was entitled to an evidentiary hearing on the challenges to the ten college students. As the Second Circuit recognized in *Pepsi-Cola*, the issue whether the Board is required to hold a hearing is quite distinct from the issue whether it is required to review *de novo* what its regional director has decided. 409 F.2d at 681-682.

[5] Nor is there substance to petitioner's contention that the Union, having agreed to an eligibility list which included the college students, was precluded from later challenging them. An agreement between the parties as to voter eligibility is not binding, where, as here, it does not conform to Board or statutory policy. *Hood Corp.*, 147 NLRB 378, 374, n. 2.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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